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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1483

SUPERMARKETS GENERAL CORPORATION T/A
HOCHSCHILD KOHN DEPARTMENT STORE,
Appellant,

V.

STATE OF MARYLAND
Appellee.

ON APPEAL FROM THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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ARGUMENT

The Motion to Dismiss or Affirm rests essentially upon the statement in *McGowan v. Maryland,* 366 U.S. 420, 427 (1961), that "the Equal Protection Clause relates to equality between persons as such, rather than between areas and . . . territorial uniformity is not a constitutional prerequisite." However, this ignores that Maryland's present scheme of blue laws rests upon an unequal distribution of the referendum power. This scheme is different in kind from the territorial differences addressed in *McGowan,* and constitutes invidious discrimination in violation of the Equal Protection Clause.

This Court has held that when governmental decisions are made by a process that does not represent all of the people, the general presumption of constitutionality of legislation is not applicable. *Kramer v. Union Free School District,* 395 U.S. 621, 627-28 (1969). The reason is that "the presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all of the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as a basis for presuming constitutionality." *Id.* at 629.

The Maryland blue laws are not enacted in a way which fairly represents all of the people, and therefore should not be presumed to be constitutional. The Maryland General Assembly has retained the power to legislate blue laws. *Steimel v. Board,* 278 Md. 1, 8, 357 A.2d 386, 391 (1976). In so legislating, it represents all of the qualified voters of the state. However, by favoring selected counties with the referendum, it has permitted the exercise of this legislative power by the vote of less than all qualified voters.

Statutory schemes which selectively grant or withhold the right to vote are subject to strict judicial scrutiny to "determine whether the exclusions are necessary to promote a compelling state interest." *Kramer,* 395 U.S. at 627; *Cipriano v. City of Houma,* 395 U.S. 701, 704 (1969); *Phoenix v. Kolodziejski,* 399 U.S. 204, 208-209 (1970). Moreover, such classifications must be drawn with precision, so that the exclusion of the disfavored class is "necessary to achieve the articulated state goal," and those with a vital interest in the outcome are not excluded *Kramer,* 395 at 632-633; *Phoenix,* 399 U.S. at 208-209; *Cipriano,* 395 U.S. at 704.

In the instant case, there is no rational basis for or legitimate state interest in favoring some counties and not

others by the grant of referendum power over Sunday closings. Therefore, it is discriminatory. Because the challenged legislation under which appellant was convicted is a product of this discrimination, it should be invalidated.

CONCLUSION

No case has been found in which this Court has decided whether the Equal Protection Clause prohibits local option legislation where, as here, the option is granted to voters in some, but not all, political subdivisions of a state. For the reasons stated above and in the Jurisdictional Statement, appellant urges that the Court deny the Motion to Dismiss or Affirm and grant plenary consideration with briefs and oral argument.

Respectfully submitted,

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